Cross – Border Trade in Services – Concepts used in FTAs

Most Favoured Nation; The idea here is that the two trading partners agree that if either of them agrees, eg in the context of a subsequent FTA negotiation with another country, to liberalise further, then that liberalisation is offered automatically also to this trading partner. This sort of clause requires deep policy reflection in capitals. It means that in a subsequent negotiation, you can never give anyone else anything better than you have given this first FTA partner.

Denial of Benefits; This is the way in which rules of origin are expressed for the services sector. They are generally pretty liberal ie pretty much any foreign firm from any third country which is established in country A can reap the benefits agreed in the FTA by country B. Unless there is an absence of diplomatic relations between Country B and the third country.

Positive/Negative List Approach; Some FTAs use the positive list approach adopted in the General Agreement in Trade in Services in the WTO ie you agree to give preferences to the FTA trading partner only in those industries listed in the Positive List. Most developed economies are increasingly disinclined, these days, to accept this approach and argue instead for a Negative List approach. The Australian Services Roundtable supports the bilateral use of a Negative List approach.

The idea here is that everything is freed up unless it is specifically listed in an Annex 1 of Non Conforming Measures. This requires a very detailed understanding of the domestic services economy and all the myriad of policy measures which impact on it. Many developing economies find this process exceedingly difficult. It is easy to "forget" to list a measure and to then discover it is politically difficult to implement removal of that measure. And most FTAs have tight dispute settlement provisions which means that there is considerable vigilance by the trading partner with respect to implementation.

A second Annex 2 allows for listing of policies and measures which you not only want to retain but also wish to retain the flexibility to adjust in a more protective direction in future. This list is obviously a matter requiring close political attention. Most negotiators would probably start out with the assumption that they should seek to list everything that is non conforming ie that the FTA Chapter on Services should embody no liberalisation and that all existing measures should be captured in the Annexes. The Annexes will therefore be subject to close scrutiny by the other negotiating partner.

It is important to be aware of the so-called Ratchet Clause. In the sample chapter we have handed out, this is article 6.(I)(c). It is worded very strangely. But what it means is that if in the future you liberalise,

unilaterally, a measure you have listed in either Annex, then that liberalisation becomes automatically bound in the FTA Agreement ie the benefit of that liberalisation can never be taken away from that FTA partner. Again, inclusion of such a mechanism requires deep reflection in capitals as the implications are significant.

Finally, a sample FTA chapter on Cross Border Trade in Services would be unlikely to contain, unlike the chapters on goods, no safeguards clause for services. Indeed, there is no such precedent anywhere yet, for such a clause. This is a matter of current controversy in the WTO Doha round of negotiations. A number of developing countries have signalled, in the context of various different FTA negotiations currently underway, that they wish to include a services safeguard clause. Obviously, most countries will be unwilling to set any precedents in this sensitive area until the matter is resolved in the WTO.

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